A **MOHAMAD SHAHRUDIN MD ISA v. PP & ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
AZIAH ALI JCA
ABANG ISKANDAR JCA
B [CRIMINAL APPEALS NO: J-05-145-05-2013 & J-05-146-05-2013]
28 AUGUST 2015

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in total of 426.77g cannabis – First accused personally handed over drugs from*
C *dashboard of car to police – Whether looking scared and nervous constituted inference of guilt – Whether first and second accused had knowledge, custody and control of drugs – Whether prima facie case proved against appellants – Principle of double presumption – Whether wrongly invoked – Whether conviction and sentence safe*

D ***CRIMINAL PROCEDURE:*** *Appeal – Appeal against conviction and sentence – First accused personally handed over drugs from dashboard of car to police – Whether looking scared and nervous constituted inference of guilt – Whether first and second accused had knowledge, custody and control of drugs – Whether both accused acted in furtherance of common intention – Whether charge against both accused persons*
E *alluded to common intention – Whether prima facie case proved against appellants – Whether trial judge wrongly invoked principle of double presumption – Whether conviction and sentence safe*

EVIDENCE: *Exhibits – Break in chain of evidence – Allegation of – Whether exhibits positively identified*
F

During a road block set up by the Agensi Anti Dadah Kebangsaan, SP5 stopped a Perodua Viva car ('the car') which was driven by the first appellant, while the second appellant was seated on the front passenger seat. After a thorough search, the first appellant himself took out a black plastic
G bag ('exh. P5A') from the dashboard inside the car and showed it to SP2, SP5 and SP4. The contents of the plastic bag were namely, two compressed slabs of plant materials suspected to be cannabis. The items were seized from the first appellant and both the appellants were arrested. The two slabs of compressed plant materials were later confirmed to be 227.5g and 199.21g of cannabis. Both appellants were subsequently charged for drug trafficking
H under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act') and punishable under s. 39B(2) of the same Act. Both of them denied the charge and claimed trial. During trial, the prosecution led evidence, amongst others, that the second appellant had looked nervous and scared when the car was stopped by the police. After a full hearing, the High Court Judge found both
I appellants guilty of the offence charged. They were convicted and both were sentenced to death. Thus, the present appeals by both accused persons against

their respective conviction and sentence. The issues considered by the Court of Appeal, *inter alia*, were: (i) whether the fact that the second appellant looked nervous and scared constituted a guilty mind of drug trafficking; (ii) whether there was a break in the chain of evidence; (iii) whether the trial judge had made an erroneous finding that the two appellants had acted in furtherance of common intention when the charge against them did not allude the invocation of s. 34 of the Penal Code; (iv) whether the trial judge had wrongly invoked the principle of double presumption.

Held (dismissing appeal by first appellant and affirming conviction and sentence; allowing appeal of second accused and setting aside conviction and sentence)

Per Abang Iskandar JCA delivering the judgment of the court:

(1) Looking scared when stopped by police did not invite an inference of guilt by conduct. The conduct of the second appellant merely amounted to a suspicion. Nor was there any matching DNA profiles incriminating the second appellant with the impugned exhibits. Neither was there in evidence for the prosecution, that the dashboard, from where the drugs were taken by the first appellant, had fingerprints of the second appellant all over it. There was no nexus that had been established by the prosecution to link the second appellant to the drugs. (paras 12, 15 & 18)

(2) The finding that the second appellant had custody or control over the impugned drugs that were recovered from the car at the material time was not justified. At its highest, the evidence led by the prosecution had shown that the second appellant was present inside the car with the first appellant and that he looked nervous when the car was stopped. No other overt act was adduced by the prosecution against him. In such circumstances, it would be difficult for the court to infer anything culpable against the second accused in relation to *mens rea* possession of the impugned drugs. There was hardly any cogent evidence led by the prosecution against the second appellant that could have constituted a *prima facie* case against the second appellant which, if unrebutted by him, would warrant a conviction. (paras 20 & 44)

(3) The car belonged to the first appellant as it was registered under his name. The first appellant was driving the car before it was stopped for inspection. The impugned drugs were taken by the first appellant from the dashboard of the car and handed to SP2. The trial judge was correct in finding that the first appellant had access to the impugned drugs and that he also had the necessary knowledge of it as well. The prosecution had established through evidence that all the necessary ingredients needed to prove affirmative possession with *mens rea* against the first appellant. With the affirmative finding on possession, the presumption of trafficking under s. 37(da) of the Act was rightly invoked. (para 27)

(4) With regards to the absence of the first appellant's finger print on the plastic wrapping that contained the drugs, it was in evidence that the said exhibit had been handled by the officers without using gloves. As such, a finger-print lifting exercise by the investigating agency was futile. Further, where the identity of the person from whom the drugs were recovered was not in issue, the need for finger print evidence must assume little significance under the circumstances. The same explanation applies with regards to the negative DNA profile. (paras 32 & 33)

(5) There was no reason to disturb the findings of fact of the trial judge with regard to the issue of alleged break in the chain of exhibits. As long as the witnesses who had handled the exhibits were able to positively identify the exhibits that were seized, it would be a sufficient answer to a challenge of break in the chain of the exhibits. There was no doubt as to the identity of the said exhibits so as to warrant the trial judge to find otherwise, in favour of the first accused. (paras 36 & 38)

(6) There was no finding by the trial judge that suggested that both appellants had acted together in furtherance of their common intention to traffic in the impugned drugs. A reference to the opening speech by the prosecution revealed that the prosecution had not intended to invoke s. 34 of the Penal Code in order to attach criminal liability against both the accused persons by using in aid such provision. There was nothing in the grounds of judgment where a reference was made by the trial judge that s. 34 of the Penal Code had been established by the prosecution. (para 41)

(7) As to the argument on invocation of double presumption of possession under s. 37(d) of the Act and of trafficking under s. 37(da) of the Act, the trial judge had only mentioned those presumptions in the context of how the presumptions could be invoked, and how the prosecution had intended to prove its case against both the accused persons. It was clear that the prosecution had opted to use s. 37(da) of the Act, namely the presumption of trafficking. The use of double presumption had not been breached by the trial judge. The first appellant had also failed to rebut the presumption of trafficking that operated against him by virtue of the weight of the dangerous drugs, *to wit*, cannabis as defined under s. 2 of the Act, in excess of 200g, on the balance of probabilities. Therefore, the prosecution had proved its case against the first appellant beyond reasonable doubt. (paras 47 & 48)

Bahasa Malaysia *Translation Of Headnotes*

Semasa satu sekatan jalan raya oleh Agensi Anti Dadah Kebangsaan, SP5 telah menahan sebuah kereta Perodua Viva ('kereta') yang dipandu oleh perayu pertama, manakala perayu kedua sedang duduk di tempat duduk penumpang hadapan. Selepas carian menyeluruh, perayu pertama sendiri

telah mengambil sebuah beg plastik hitam ('exh. P5A') dari 'dashboard' di dalam kereta dan menunjukkannya kepada SP2, SP5 dan SP4. Kandungan beg plastik tersebut adalah dua ketulan mampat bahan tumbuhan yang disyaki kanabis. Bahan-bahan tersebut telah dirampas dan kedua-dua perayu telah ditahan. Kedua-dua ketulan mampat tersebut disahkan sebagai 227.5 gram dan 199.21 gram kanabis. Kedua-dua perayu kemudiannya dipertuduh dengan pertuduhan mengedar dadah di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'), dan boleh dihukum di bawah s. 39B(2) Akta yang sama. Kedua-dua perayu menafikan pertuduhan tersebut dan memohon agar dibicarakan. Semasa perbicaraan, pihak pendakwaan telah mengemukakan keterangan, antara lain, bahawa perayu kedua kelihatan gementar dan takut apabila keretanya dihentikan oleh pihak polis. Selepas perbicaraan penuh, Hakim Mahkamah Tinggi mendapati kedua-dua perayu bersalah atas kesalahan yang dipertuduhkan. Kedua-dua mereka telah disabitkan atas kesalahan dan dihukum mati. Oleh itu, rayuan ini oleh kedua-dua perayu terhadap sabitan dan hukuman masing-masing. Isu-isu yang dibangkitkan untuk penentuan mahkamah, antara lain, adalah: (i) sama ada fakta bahawa perayu kedua kelihatan gementar dan takut menunjukkan kebersalahannya terhadap kesalahan mengedar dadah; (ii) sama ada rantaian keterangan terputus; (iii) sama ada hakim bicara telah khilaf dalam memutuskan bahawa kedua-dua perayu bertindak bagi mencapai niat bersama tetapi pertuduhan terhadap mereka tidak memperuntukkan kegunaan s. 34 Kanun Keseksaan; (iv) sama ada hakim bicara telah mengguna pakai anggapan berganda dengan salah.

Diputuskan (menolak rayuan perayu pertama dan mengesahkan sabitan dan hukuman mati; membenarkan rayuan perayu kedua dan mengenepikan sabitan dan hukuman mati)
Oleh Abang Iskandar HMR menyampaikan penghakiman mahkamah:

(1) Kelihatan takut apabila ditahan oleh polis tidak mencetuskan inferens kebersalahan melalui tingkah laku. Kelakuan perayu kedua hanya terjumlah kepada satu syak wasangka. Tidak ada apa-apa profil DNA berpadanan yang menunjukkan kebersalahan perayu kedua dengan ekshibit yang dipersoalkan. Tambahan lagi, tiada keterangan bagi pihak pendakwaan bahawa 'dashboard' dari mana dadah diambil oleh perayu pertama, mempunyai cap jari perayu kedua padanya. Tidak ada pertalian yang telah dibuktikan oleh pihak pendakwaan untuk menghubungkan perayu kedua dengan dadah tersebut.

(2) Dapatan bahawa perayu kedua mempunyai jagaan atau kawalan ke atas dadah yang dipersoalkan yang dijumpai daripada kereta pada masa tersebut tidak boleh dijustifikasikan. Paling tidak, keterangan yang dikemukakan oleh pihak pendakwaan menunjukkan bahawa perayu kedua hadir di dalam kereta dengan perayu pertama dan dia kelihatan

gelisah apabila kereta tersebut diberhentikan. Tiada tindakan terang-terangan lain yang dikemukakan oleh pihak pendakwaan terhadapnya. Dalam keadaan sedemikian, sukar untuk mahkamah membuat apa-apa anggapan niat kebersalahan terhadap perayu kedua berhubungan dengan pemilikan *mens rea* dadah yang dipersoalkan. Hampir tiada apa-apa bukti meyakinkan yang dikemukakan oleh pihak pendakwaan terhadap perayu kedua yang boleh mewujudkan kes *prima facie* terhadap perayu kedua yang jika tak disangkal olehnya, akan mewajarkan sabitan.

(3) Kereta tersebut adalah milik perayu pertama kerana ia didaftarkan di bawah namanya. Perayu pertama sedang memandu kereta tersebut sebelum diberhentikan untuk pemeriksaan. Dadah yang dipersoalkan telah diambil oleh perayu pertama daripada 'dashboard' kereta dan dia telah menyerahkannya kepada SP2. Hakim bicara adalah betul dalam membuat dapatan bahawa perayu pertama mempunyai akses kepada dadah yang dipersoalkan dan bahawa dia juga mempunyai pengetahuan mengenainya. Pihak pendakwaan berjaya membuktikan melalui keterangan bahawa semua unsur-unsur yang diperlukan untuk membuktikan pemilikan afirmatif dengan *mens rea* terhadap perayu pertama. Dengan penemuan afirmatif mengenai pemilikan, anggapan pengedaran di bawah s. 37(da) Akta telah diguna pakai dengan betul.

(4) Merujuk kepada ketiadaan cap jari perayu pertama pada bungkusan plastik yang mengandungi dadah tersebut, adalah di dalam keterangan bahawa ekshibit tersebut telah dikendalikan oleh pegawai-pegawai tanpa menggunakan sarung tangan. Oleh itu, pengambilan cap jari oleh agensi penyiasat adalah sia-sia. Selanjutnya, sekiranya identiti orang dari mana dadah ditemui tidak menjadi persoalan, keperluan keterangan cap jari mestilah dianggap kurang bernilai. Penjelasan yang sama diguna pakai kepada profil DNA negatif.

(5) Tiada sebab untuk mengganggu dapatan fakta hakim bicara mengenai isu terputusnya rantaian ekshibit. Selagi saksi-saksi yang mengendalikan ekshibit dapat mengenal pasti secara positif ekshibit yang dirampas, adalah mencukupi bagi menjawab cabaran terhadap pemutusan dalam rantaian ekshibit. Tiada keraguan mengenai identiti ekshibit yang mewajarkan hakim bicara untuk membuat dapatan sebaliknya, memihak kepada perayu pertama.

(6) Tiada dapatan oleh hakim bicara yang mencadangkan bahawa kedua-dua perayu telah bertindak bersama-sama bagi mencapai niat bersama untuk mengedar dadah yang dipersoalkan. Rujukan kepada ucapan pembukaan pendakwaan mendedahkan bahawa pihak pendakwaan tidak berniat untuk mengguna pakai s. 34 Kanun Keseksaan untuk mengaitkan liabiliti jenayah terhadap kedua-dua perayu dengan mengguna pakai bantuan

peruntukan tersebut. Tambahan lagi, tiada apa-apa dalam alasan penghakiman di mana rujukan telah dibuat oleh hakim bicara bahawa s. 34 Kanun Keseksaan telah dibuktikan oleh pendakwaan.

(7) Berkaitan hujahan mengenai anggapan berganda milikan di bawah s. 37(d) Akta dan pengedaran di bawah s. 37(da) Akta, hakim bicara hanya menyebut tentang anggapan berikut dalam konteks bagaimana anggapan tersebut boleh diguna pakai, dan bagaimana pihak pendakwaan berniat untuk membuktikan kesnya terhadap kedua-dua perayu. Jelas bahawa pendakwaan telah memilih untuk menggunakan s. 37(da) Akta, iaitu anggapan pengedaran. Kegunaan anggapan berganda tidak dimungkiri oleh hakim bicara. Perayu pertama juga gagal mematahkan anggapan pengedaran yang beroperasi terhadapnya menurut berat dadah berbahaya, iaitu kanabis seperti ditakrifkan di bawah s. 2 Akta, melebihi 200g, atas imbangan kebarangkalian. Oleh itu, pihak pendakwaan telah berjaya membuktikan kes terhadap perayu pertama melampaui keraguan munasabah.

Case(s) referred to:
Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(refd)***
Balachandaran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Gunalan Ramachandran & Ors v. PP [2004] 4 CLJ 551 CA ***(refd)***
Hasbala Mohd Sarong v. PP [2013] 6 CLJ 945 FC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
Su Ah Ping v. PP [1979] 1 LNS 100 FC ***(refd)***
Teng Howe Sing v. PP [2009] 3 CLJ 733 FC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), (da), 39B
Evidence Act 1950, ss. 8, 9
Penal Code, s. 34

Other source(s) referred to:
Charles C Moore, *A Treaties on Fact or the Weight and Value of the Evidence,* vol 1, p 61

(Criminal Appeal No: J-04-145-05-2013)
For the appellant - Mohd Fadzli Mohd Ramly (Mohd Ridzuan Muhamad & Ahmad Deniel Roslan with him); M/s Mohd Fadzli & Co
For the respondent - Tengku Intan Suraya Tengku Ismail; DPP

(Criminal Appeal No: J-05-146-05-2013)
For the appellant - Ibrahim Kamaruddin (Mohd Hisham Abd Rahim & Osman Abdullah with him); M/s Osman Abdullah & Co
For the respondent - Tengku Intan Suraya Tengku Ismail; DPP

Reported by Sandra Gabriel

A

JUDGMENT

Abang Iskandar JCA:

Introduction

[1] Mohamad Shahrudin bin Md Isa (the first accused) and Mohamad B Yusof bin Mohamad Ali ("the second accused") were charged for trafficking in dangerous drugs as per amended charge as follows:

> Bahawa kamu bersama-sama pada 14hb Julai 2011 Jam lebih kurang 9.45 malam, bertempat di KM21, Jalan Mersing-Kota Tinggi, Jemaluang, Dalam Daerah Mersing, di dalam negeri Johor telah didapati mengedar C dadah jenis Cannabis seberat 426.78 gram, dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

The Prosecution's Case

D **[2]** On 14 July 2011, a team from Agensi Anti Dadah Kebangsaan ("AADK") had set up a road block at Jalan Mersing, Mersing, Johor.

[3] Zulzamani bin Abu Samah (SP5) who led the team had stopped a Perodua Viva car bearing registration number JMG 3185 ("the car"). The car was driven by the first accused, while the second accused was seated on E the front passenger seat next to the first accused.

[4] After introducing himself as an enforcement officer for AADK, SP5 asked the first accused to park the car at the road side, which he did. During the ensuing inspection, both the accused persons were asked to alight and directed to go to the rear portion of the car. A body search was conducted F on them by Ashril Rezza bin Mohamed Asri (SP2). However, no incriminating item was found on their person. SP2 testified that he saw the first accused's lap was wet while the second accused was just standing there, silently.

[5] After a thorough search was done, the first accused himself took out G a black plastic bag (exh. P5A) from the dashboard inside the car and opened it. The contents of the plastic bag namely, two compressed slabs of plant materials, suspected to be cannabis, were shown to SP2, SP5, and Mohd Zaki bin Hussin (SP4). The items were seized from the first accused person and both the first and the second accused persons were arrested.

H **[6]** The seized items were later sent to the chemistry department for analysis, and the chemist had confirmed that the two slabs of compressed plant materials were 227.5g and 199.21g of cannabis as defined under s. 2 of the Dangerous Drugs Act 1952 ("the DDA 1952"), respectively.

I **[7]** Both the accused persons were subsequently charged on the charge of drug trafficking as per the above-quoted charge. Both of them denied the charge and claimed trial. After a full hearing, the learned High Court Judge

found both accused persons guilty of the offence charged. They were duly convicted and both were sentenced to death. Thus, these appeals by both accused persons against their respective conviction and sentence.

The Appeal

[8] We heard both appeals on 11 November 2014. After perusing the records of appeal and having heard submissions by all parties, we unanimously dismissed the appeal of the first accused person whereby we had affirmed his conviction and sentence by the learned trial judge. In respect of the appeal of the second accused person, we had allowed his appeal, whereby we had set aside his conviction and sentence. We had acquitted and discharged him accordingly of the charge that was proffered against him. Both the first accused person and the prosecution had filed their respective notice of appeal as a result of our decisions. We now set out our reasons for having so decided the way we did.

Appeal Of The Public Prosecutor

[9] We will deal with the appeal against our decision of acquittal and discharge in relation to the second accused person first. The evidence against the second appellant was really scanty, to say the least. He was a mere passenger in the car when the car was stopped for inspection at the road block. There was no evidence led against him by the prosecution, such as positive fingerprint of him found either on the black plastic bag or on either of the two slabs of plant materials. Neither was there any DNA evidence of him having been established by the investigation that would link him to the impugned drugs that were recovered from the dashboard inside the car.

[10] Apart from his mere presence in the car at the alleged material time, he was said to have looked nervous, as described by the prosecution's evidence.

[11] Under such circumstances we had agreed with learned counsel for the second accused that there was insufficient evidence led by the prosecution to justify a finding of a *prima facie* case against him at the end of the prosecution's case. His defence ought not to have been called by the learned trial judge.

[12] We now advert to the relevant evidence that was recorded by the trial judge in that regard. The learned trial judge had relied very heavily on the fact that the second accused person had looked nervous when the car that was driven by the first accused person and in which he was the front seat passenger. Looking scared when stopped by police does not necessarily invite an inference of guilt by conduct. Something more than that would be required to convince the court that such an observation that the second accused had looked scared was in fact actuated by an acute feeling of guilt on his part.

[13] This kind of evidence falls within the realm of evidence by conduct. Like other types of evidence, conduct is relevant in proving a fact in issue. Section 8 of the Evidence Act 1950 provides for such basis. At the end of the day, conduct may indeed be incriminatory against an accused person. It too may not amount to any incrimination at all. In fact, it may amount to something that is consistent with innocence rather than with guilt.

[14] We would need only to quote the speech of learned Justice Edgar Joseph Jr (SCJ) in the case of *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 (*Abdullah Zawawi*'s case), to illustrate the point.

> An innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way. It is true that the appellant himself denied running away but we agree with the judge that the appellant lied on this point, but this does not preclude us from drawing such inferences as may be justified from the evidence adduced by the prosecution. The Jamaican Privy Council case of *DPP v. Brooks* [1974] 2 All ER 840, cited to us by the learned deputy public prosecutor, where the accused, who occupied the driver's seat of a stationary van which contained more than 1000 lbs of ganja, together with several others in the van, scrambled out and ran off, when police officers hurried towards the van, is, therefore, readily distinguishable.

[15] Applying the principle in the *Abdullah Zawawi*'s case *(supra)* to the evidence of conduct led against the second accused person, we were of the view that at the highest, it could amount to strong suspicion, but suspicion, however strong could not equate evidence. It remains only as suspicion, however grave. Indeed, one of the compelling and telling descriptions as to the true nature of word "suspicion" was supplied by Charles C. Moore in his celebrated work entitled *"A Treaties on Fact or the Weight and Value of the Evidence"*, vol. 1, at p. 61, as follows:

> [a] a suspicion cannot give probative force to testimony which in itself is insufficient to establish or to justify an inference of particular fact and 'the sea of suspicion has no shore and the court that embarks upon it is without rudder or compass.

[16] Different people react differently when stopped by the authorities. Looking nervous would not be entirely unusual. Merely having knowledge of the existence of a contraband item, in itself, without more, does not equate possession with *mens rea*, the kind of possession which the law seeks to criminalise. To our mind, mere evidence of having looked nervous, would not, without more, constitute a guilty mind that the second accused person of drug trafficking. It also would not, alone be sufficient to constitute a *prima facie* proof of the charge that was preferred against him. It is a well settled rule that the onus of proving everything essential to the establishment of a charge rests squarely on the shoulders of the prosecution.

[17] Central in a charge for drug trafficking under s. 39B of the DDA 1952, there is always the element of possession that needed to be proven by the prosecution against the accused person. The law on possession with *mens rea* is rather trite. We would need, with respect, only refer to the case of *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] MLJ 237 where Thompson J (as he then was) had said:

> A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

[18] In this instant appeal, the evidence as led by the prosecution had shown that the car belonged to the first accused person. True, the second accused person was a passenger seated in the front seat next to the first accused. However, as was alluded to earlier, there was no fingerprint of the second accused person, uplifted from the impugned exhibits, which could have justified pointing an accusing finger at the second accused person. Nor was there any matching DNA profiles incriminating the second accused person with the impugned exhibits. Neither was there in evidence for the prosecution, that the dashboard, from where the drugs were taken by the first accused person, had fingerprints of the second accused person all over it. To our mind, there was no nexus that had been established by the prosecution to link the second accused person effectively to the drugs.

[19] It did not escape our consideration that in the context of proving guilt by the prosecution in a criminal case, such as in this instant appeal against the second accused person, the attendant burden is one that requires proof beyond reasonable doubt. Even in order to call for defence to be entered, the burden is by no means a light one. Indeed, in considering whether to call for defence to be entered, the trial judge must subject the prosecution evidence to a maximum evaluation, in the sense that should the accused choose to remain silent, when ordered to enter on his defence, the court is in a position to convict him of the charge. (See the case of *Balachandaran v. PP* [2005] 1 CLJ 85, *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734.)

[20] As such, in light of the evidence led against the second accused person, we had agreed with the submissions by learned counsel for the second accused person that it would not be justified for a finding that the second accused person had custody or control over the impugned drugs that were recovered from the car at the material time. At its highest, the evidence led by the prosecution had shown that the second accused person was present inside the car with the first accused person and that he looked nervous when the car was stopped by SP5 and his team. No other overt act was adduced by the prosecution against him. In such circumstances, it would be difficult for the court to infer anything culpable against him in relation to *mens rea*

possession of the impugned drugs. We would, in this regard, refer to the speech by Lord Reading CJ in the case of *Gray* 12 Cr App Report 244 as follows:

> Equally it must be borne in mind that the mere fact of standing by when the act was committed is not sufficient. A man to become amenable to the law must take such a part in the commission of the crime as must be the result of a concerted design to commit the offence.

[21] Upon due perusal of the evidence as adduced, we were unable to say that the second accused person had been shown by the prosecution to have the necessary *actus reus*, much less the *mens rea*, to justify the calling of his defence to the charge.

[22] As such, we had allowed the appeal of the second accused person (Mohamed Yusof bin Mohd Ali) and we had proceeded to set aside the conviction and sentence imposed against him by the learned trial judge. In its place, we had entered an order of acquittal and discharge in favour of the second accused person. He was acquitted and discharged forthwith.

Appeal Of The First Accused Person

[23] As regards the appeal of the first accused person, namely Mohamed Shahrudin bin Md Isa, it was impressed upon us by learned counsel for the first accused person there existed a few grounds as to why the appeal of his client deserved to be allowed by us. We now deal with them in turn.

That There Was No Custody Or Control By The First Accused Person So As To Justify A Finding Of Mens Rea Possession Of The Impugned Drugs Against Him

[24] Let us look at the evidence adduced before the learned trial judge. The evidence led by the prosecution had shown that the car that in which the drugs were recovered was registered in the name of the first accused person. It was also in evidence that when stopped, the first accused person had looked scared and that his pants were seen to be wet at his thigh area.

[25] But the most damning evidence against him must be his conduct of showing and retrieving the impugned drugs from inside the dashboard of the said car. He had retrieved the drugs and handed them all to the prosecution witnesses.

[26] In this regard, with respect, we agreed with the submission by learned miss deputy that his conduct came under s. 8 of the Evidence Act 1950 and he had the onus, under the law, to rebut this evidence under s. 9 of the same. How these two sections operate had been explained by the apex court in the case of *Parlan Dadeh v. PP* [2009] 1 CLJ 717; [2009] 1 MLJ 137 in the speech attributed to the learned Justice Augustine Paul FCJ that needed no further elaboration. In the case of *Teng Howe Sing v. PP* [2009] 3 CLJ 733 the court found that there was a nexus between the conduct of the accused person and the drugs, when he was seen throwing away the package containing the drugs

upon hearing shouts of "polis, jangan lari." Of course he had also attempted to take flight. The court found that the cumulative effect of his conduct in relation to the drugs was all too clear for an inference to be drawn that the accused person knew the nature of the things found in his possession. The apex court agreed with such finding by the trial court of possession against the accused person.

[27] With respect, the first accused person had failed to explain away his conduct. We therefore saw no merits in the contention by learned counsel for the first accused person, that his client did not have the necessary *mens rea* possession. Indeed, we agreed with the learned trial judge on his affirmative finding of *mens rea* possession *vis-a-vis* the first accused person. The learned trial judge had taken into consideration the fact that the car belonged to the first accused as it was registered under his name. He was driving the car before it was stopped for inspection and the impugned drugs were taken by him from the dashboard of the car and he had handed the impugned exhibits in a black plastic bag to SP2. The learned trial judge was correct in finding that the first accused person had access to the impugned drugs and that he had the necessary knowledge of it as well. As such, the learned trial judge was correct in finding that he had possession with *mens rea* over the impugned drugs. As to his defence, suffice for us to say that we agreed with the manner in which the learned trial judge had dealt with the issue of one by the name of Pak Cik Azman. The prosecution had established through evidence that all the necessary ingredients needed to prove affirmative possession with *mens rea* against the first accused person had been established. With that affirmative finding on possession, the presumption of trafficking under s. 37(da) of the DDA 1952 was rightly invoked. As such, with respect, we were not able to accede to the submissions of learned counsel for the first accused that his client had no custody or control over the said drugs.

That There Were No Incriminating Fingerprints And No Matching DNA Profile That Were Produced By The Prosecution

[28] It was argued by learned counsel that there was no fingerprint of the first accused person on the plastic cover, which contained the plant material confirmed by the chemist to be cannabis, as defined under s. 2 of the DDA 1952.

[29] On top of that, no DNA profile was found from the same plastic cover which had matched the DNA profile of the first accused person.

[30] Based on these two negative findings by the prosecution witnesses, it was submitted before us by learned counsel that the first accused person ought to be acquitted as there was no incriminating evidence, in terms of fingerprints and DNA profile that pointed to his involvement with the impugned drugs.

[31] It was argued before us that the absence of fingerprint and negative DNA profile had completely exonerated the first accused person from the clutches of the drug trafficking charge under s. 39B of the DDA 1952.

[32] With regard to the absence of fingerprint of first accused person on the plastic wrapping that contained the drugs, it had been explained by the investigating officer. It was in evidence that the said exhibit had been handled by the searching officers without using gloves. As such, a fingerprint lifting exercise by the investigating agency would only prove futile. We found that reason as being acceptable.

[33] Be that as it may, the high authority in the decision of the apex court in case of *PP v. Mansor bin Md Rashid & Anor* [1997] 1 CLJ 233, had clearly stated that where the identity of the person from whom the drugs were recovered was not in issue, the need for fingerprint evidence must assume little significance under the circumstances. In this case, it was the first accused person who had shown the prosecution witness as to the existence of the impugned drugs in the dashboard in the said car. The nexus between the first accused person and the drug exhibit was all too clear to see. With respect, we are of the view that the same explanation applies with regards to the negative DNA profile. There was direct oral evidence of the police witness stating to the effect that the first accused had handed the drug exhibits to him. In a situation such as this, the need for a matching DNA profiling may be good to have but it is by no means essential. Its significant utility has been, to a great extent rendered as less impactful, in light of other compelling evidence in the form of direct evidence from the relevant prosecution witnesses. Indeed, in the case of *Gunalan Ramachandran & Ors v. PP* [2004] 4 CLJ 551, it was held by the Court of Appeal that

> Where there is proof of possession, the absence of fingerprint impressions does not affect the finding of possession.

[34] We therefore saw no merit in the contention put across to us by learned counsel on behalf of the first accused person on the issues pertaining to the fingerprint and DNA profile.

That There Was A Break In The Chain Of Exhibits

[35] The issue of break in the chain of exhibits was also raised. We had looked and had perused through the evidence. We noted that from the evidence led by the prosecution that all the witnesses who had handled the drug exhibits in the course of police investigation into this case had positively identified the said exhibits in court, on account of their respective signatures and markings that they had made on the said exhibits.

[36] The case of *Hasbala Mohd Sarong v. PP* [2013] 6 CLJ 945 is very much in point. As long as the witnesses who had handled the exhibits were able to positively identify the exhibits as the very exhibits that were seized and

which they were concerned with during the seizure, which would be a sufficient answer to a challenge of break in the chain of the exhibits. The proposition, as stated in the apex court case of *Su Ah Ping v. PP* [1979] 1 LNS 100; [1980] 1 MLJ 75 is very much still good law on the issue of break in the chain of exhibits.

[37] Reverting to the complaint premised on the alleged break in the chain of exhibits in this case, it was not denied that the plastic bag exh. P5A was not listed in the handing over list of items seized, namely exh. P15. The learned trial judge had accepted the omission as an honest oversight as SP2 had no prior experience in handling drugs cases. He had cited the testimonies of SP4 and SP6 to lend support for such a finding by him. In his grounds of judgment, the learned trial judge had said, at p. 0030 in his grounds of judgment:

> Lagipun Mahkamah perhatikan berasaskan rantaian keterangan kes ini jelas menunjukkan plastik warna hitam (ekshibit P5A) sepanjang masa dalam milikan OKT 1 diawasi oleh SP2, SP4 dan SP5 dan kemudiannya diberi tandaan "RR" oleh Pegawai Penyiasat kes (SP9) untuk disimpan selamat di dalam peti besi kemudiannya dianalisa oleh Ahli Kimia (SP3) dan akhirnya dikemukakan di Mahkamah dengan adanya tandaan yang sama dicamkan oleh SP2, SP4, SP5, SP8 dan SP9 tanpa was-was dan meragukan. Jadi mana mungkin dalam keadaan sedemikian dikatakan kes pendakwaan telah terjejas.

[38] His finding had been premised on the evidence as properly led before him. There was no doubt as the identity of the said exhibits so as to warrant the trial judge to find otherwise, in favour of the first accused person. We therefore saw no reason to disturb his findings of fact with regard to the issue of alleged break in the chain of exhibits.

On The Issue Of Common Intention

[39] It was also argued before us that the trial judge had made an erroneous finding that the two accused persons had acted in furtherance of common intention of them both when in fact the charge that was preferred against them did not allude to the invocation of that provision under s. 34 Penal Code against both the accused persons.

[40] We had occasion to look at the part of the judgment of the learned trial judge which had since become a source of grievance on the part of the defence. We found that alleged error had resided at pp. 0039- 0040 of the record of appeal. We could see there that in fact, the trial judge had asked himself the question, whether on the evidence as led at the end of the prosecution case, a *prima facie* case had been successfully established against both accused persons and further on maximum evaluation of the evidence, as follows: "sama ada bersedia untuk mensabitkan OKT1 bersama-sama OKT2 atas pertuduhan yang dihadapkan jika pembelaan dipanggil dan OKT1

bersama-sama OKT2 memilih untuk berdiam diri." He had answered that question in the affirmative and had therefore ordered both the accused persons to enter on their defence to the charge. At para. 47 of his grounds of judgment, he also had said:

> (47) Jadi berdasarkan nas undang-undang … **OKT1 bersama-sama OKT2** menyimpan dadah tersebut untuk tujuan pengedaran ….. 1952. (emphasis added)

[41] Now, we had considered this complaint. In light of the records of appeal, in particular, the grounds of judgment of the trial judge, we found that there was no finding by the trial judge that both the accused persons had acted in a manner that could suggest that they had acted together in furtherance of their common intention to traffic in the impugned drugs. Indeed, a perusal of the evidence did not show such evidence having been led by the prosecution. A reference to the opening speech by the prosecution had revealed that the prosecution had not intended to invoke s. 34 of the Penal Code in order to attach criminal liability against both the accused persons by using in aid such provision. There was nothing in his grounds of judgment where a reference was made by the trial judge that s. 34 of the Penal Code had been established by the prosecution. In the absence of s. 34 Penal Code having been invoked in aid, it would therefore mean that the prosecution would have to prove the charge against each of the two accused persons separately and individually. The evidence led must distinctively prove that a *prima facie* case had been established by the prosecution at the end of the prosecution case.

[42] Premised on the above, with respect, the use of the phrase "OKT1 bersama-sama OKT2" by the trial judge had nothing to do with s. 34 of the Penal Code. We had occasion to peruse through the grounds of judgment of the trial judge and to be fair, he did not refer to s. 34 of the Penal Code in his ground of judgment. We believed that such was the game plan of the prosecution, bearing in mind how the opening speech had been couched. There was a deliberate omission to make use of s. 34 of the Penal Code. If there was an initial oversight on the part of the prosecution, there was nothing in the records of appeal that would indicate that there had been an application by the prosecution to amend the opening speech at any stage of the proceedings to address such omission. The learned trial judge did not make any finding that the prosecution had proven that the two appellants had committed the offence "in furtherance of a common intention of them both" which, in essence, is the pith and substance of s. 34 of the Penal Code.

[43] As such, we do not see any merit in the complaint of learned counsel. We noted that having outlined the incriminating evidence against each of the two appellants, the learned trial judge did not in any way, make any finding in law that those acts were committed by each of them in order to achieve a common intention, *to wit*, a pre-arranged plan, between them, to commit the offence as was proffered against them both. As regards the element of a

pre-arranged plan, so crucial in finding common intention, no such finding was made by the learned trial judge. As such, the nett effect of such exercise is that the prosecution had to prove the case against the two accused persons separately and distinctly, as each distinct individual.

[44] Having looked at the evidence led by the prosecution, we found there was hardly any cogent evidence led by the prosecution against the second accused person that could have, in all fairness, constituted a *prima facie* case against the second accused person which, if unrebutted by him, would warrant a conviction to be entered against him by the court. His defence ought not to have been called by the learned trial judge. Indeed, the learned miss deputy was candid enough and had conceded that without the invocation of s. 34 of the Penal Code by the learned trial judge, the defence of the second accused person ought not to have been called to answer to the charge.

That There Was Wrong Invocation Of Double Presumption By The Learned Trial Judge

[45] For good measure, it was also the complaint by the defence counsel that the learned trial judge had invoked the double presumptions in s. 37(d) and s. 37(da) of the DDA 1952. According to learned counsel this could not be done. The prosecution could not use both presumptions of possession and trafficking in one and the same prosecution. The case of *Muhammed bin Hassan v. PP* [1998] 2 CLJ 170 was cited in support. We had no difficulty with the well-laid principle in that case, as indeed we found it to be trite law.

[46] As to the argument on invocation of double presumption of possession under s. 37(d) DDA 1952 and of trafficking under s. 37(da) of the DDA 1952 by the learned trial judge, we were referred to pp. 18 and 19 of the notes of proceedings in the appeal records.

[47] Having looked at what was recorded on these pages, what had become clear to us had been that the learned trial judge had only mentioned those presumptions in the context of how the presumptions could be invoked and in the context of this case, how the prosecution had intended to prove its case against both the accused persons. It is clear that the prosecution had opted to use s. 37(da) DDA 1952, namely the presumption of trafficking. We did not see anywhere on those pages referred to us or for that matter anywhere else in his grounds of decision, whereby the embargo on the use of double presumption, as enunciated with great clarity by the apex court in *Muhammad Hassan v. PP (supra)* had been breached by the learned trial judge. As such, that complaint premised on alleged wrongful use of double presumption by the learned trial judge in this case was dismissed as it lacked substance, upon our perusal of the entire records of appeal.

A

Court's Findings And Conclusion

[48] In the upshot therefore, having perused the records of appeal and the submissions, both oral and written, by both learned counsel and the learned miss deputy, we were of the respectful view that the first accused person's appeal ought to be dismissed and we had so ordered accordingly. The defence
B was, in effect, a mere denial without more. The first accused person had also failed to rebut the presumption of trafficking that operated against him by virtue of the weight of the dangerous drugs, *to wit*, cannabis as defined under s. 2 of the DDA 1952, in excess of 200g, on the balance of probability. He had also failed to raise a reasonable doubt that he was in possession of the
C impugned drugs. The prosecution had proven its case against the first accused person beyond reasonable doubt as per the charge.

[49] We were satisfied that the conviction entered and sentence imposed against him by the learned trial judge was safe. We had therefore affirmed the decision of the learned trial judge against the first accused person.

D

[50] To recap, the appeal of the second accused person was allowed. He was acquitted and discharged. Both his conviction and sentence by the learned trial judge were set aside. The appeal of the first accused person was dismissed. Both his conviction and sentence by the learned trial judge were
E affirmed. Order accordingly.

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